



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AYCAGUER v. FRANCE

(Application no. 8806/12)

JUDGMENT
(extracts)

STRASBOURG

22 June 2017

FINAL

22/09/2017

This judgment became final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Aycaguer v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President*,

Erik Møse,

Nona Tsotsoria,

André Potocki,

Síofra O’Leary,

Mārtiņš Mits,

Gabriele Kucsko-Stadlmayer, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 9 May 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 8806/12) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr Jean-Michel Aycaguer (“the applicant”), on 20 January 2012.

2. The applicant was represented by Ms A.-M. Mendiboure, a lawyer practising in Bayonne. The French Government (“the Government”) were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs with the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his conviction for having refused to undergo DNA profiling had amounted to an unjustified infringement of his right to respect for his private life within the meaning of Article 8 of the Convention.

4. On 26 March 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and lives in Ossès.

6. On 17 January 2008 he attended a rally organised by a Basque agricultural trade union and by the GFAM (a mutual-benefit land alliance), the “Lurra”, on the occasion of a meeting of the Technical Committee of the

Land Use and Rural Settlement Corporation (SAFER) in the Pyrénées-Atlantiques Département. That meeting had been aimed at producing an opinion on the use of the land comprising a farm which Mr F.L. had been operating for several years. The rally was held in a political and trade-union situation where tensions had been heightened by the fact that the majority agricultural union in the Département was backing candidates other than Mr F.L. At the end of the meeting scuffles broke out between the demonstrators and the gendarmerie.

7. The applicant was placed in police custody and brought before the Bayonne Criminal Court under “immediate summary trial” procedure, and charged with intentional violence not entailing total unfitness for work, against gendarmes whose identity has not been established, and against a person exercising public authority, using or threatening to use a weapon, in this instance an umbrella.

8. By judgment of 13 March 2008, the applicant was sentenced to two months’ imprisonment, suspended, for having struck gendarmes with an umbrella, which incident had not entailed unfitness for work on the latter’s part. In its judgment, the court noted that the applicant had refused to answer questions during the investigation or to admit to any wrongdoing, and had denied that he had been carrying an umbrella. The judges noted that witnesses had nevertheless stated that he had attempted to cross the barrier by clambering over demonstrators and trying to hit the gendarmes with his umbrella. The applicant pointed out that he had refrained from appealing in order to calm the situation and in the framework of a friendly settlement of the dispute that had been the cause of the rally.

9. On 24 December 2008, following a request from the Bayonne Public Prosecutor’s Office, the applicant was ordered by the police to give a DNA sample, on the basis of Articles 706-55 and 706-56 of the Code of Criminal Procedure (CPP). He was brought before the Criminal Court on 19 May 2009 for refusing to give the sample.

10. By judgment of 27 October 2009, the Bayonne Regional Court imposed on the applicant a fine of five hundred euros.

11. On 3 February 2011 the Pau Court of Appeal upheld that judgment. As regards the legal aspect of the offence, it stated, in particular, that unlike the applicants in the case of *S. and Marper v. the United Kingdom* ([GC], nos. 30562/04 and 30566/04, ECHR 2008), the applicant had been convicted, rather than suspected, of an offence, which precluded him from arguing that the impugned judgment had entailed a disproportionate interference with his private life. Relying, in particular, on the 16 September 2010 decision of the Constitutional Council (see paragraph 16 below), it held that “the provisions of national law applied [to the applicant] were such as to reconcile respect for private life and the protection of public order in a manner that was neither manifestly unbalanced nor in breach of the requirements of Article 8 of the Convention”. In connection with the

substantive aspect of the offence, the Court of Appeal dismissed the applicant's plea that a sample had already been taken from his headgear during his police custody and that he was entitled to refuse further sampling, given that there had been no DNA profiling the first time.

12. The applicant lodged an appeal on points of law. His first plea was that the sample geared to identifying his DNA and storing the corresponding data amounted to a disproportionate interference with his private life, having regard to the duration of the data storage and his personal situation (an easily identifiable person who was socially well-established, with a job, a family and a fixed abode). In his second plea, he argued that the Court of Appeal had provided no reasons for its decision in connection with the substantive aspect of the offence.

13. By judgment of 28 September 2011, the Court of Cassation dismissed the applicant's appeal on points of law as follows:

“... the Court of Appeal responded adequately and cogently to the main points of the pleadings submitted to it, and characterised all the substantive and purposive aspects of the offence of refusing to undergo a biological test, of which it found the defendant guilty, in full compliance with the provisions of Article 8 of the Convention.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. CPP

14. The relevant provisions of the CPP concerning the national computerised DNA database read as follows:

Article 706-54

“The purpose of the national computerised DNA database, which is supervised by a member of the national legal service, is to centralise all DNA data obtained by the biological analysis and DNA profiling of persons found guilty of one of the offences listed in Article 706-55, with a view to facilitating efforts to locate and identify the perpetrators of those offences. ...

DNA profiles of persons concerning whom there is serious or corroborative circumstantial evidence pointing to their likely involvement in the perpetration of any of the offences mentioned in Article 706-55 shall also be stored in the database further to a decision by a police officer acting *ex officio* or at the request of the State Prosecutor or the investigating judge, which decision must be included mentioned in the case file. Such profiles may be deleted at the request of the State Prosecutor where their retention has become unnecessary for the purposes of the database. Where the data subject requests such deletion, the State Prosecutor must inform him or her of the action taken on his or her request; if the public prosecutor does not order the deletion, the person concerned may apply to the liberties and detention judge to contest that decision. An appeal shall lie with the president of the investigation division against the latter judge's decision.

....”

Article 706-55

“The national DNA database shall centralise DNA samples concerning the following offences:

...

2. Crimes against humanity and crimes and offences of deliberate attempts on life, acts of torture and barbarity, deliberate violence, threats against persons, narcotics trafficking, infringement of persons’ freedom, human trafficking, procuring, exploitation of begging and endangerment of minors ...

...”

Article 706-56

“I.- A police officer may conduct or order, under his own supervision, in respect of the persons mentioned in the first, second and third indents of Article 706-54, biological testing with a view to DNA profiling. ...

...

II.- Any refusal to undergo the DNA sampling as provided for in the first indent of paragraph I above shall be punishable with one year’s imprisonment and a fine of 15,000 euros.

...”

Article R. 53-10

“ ...

II.- Further to a decision by the State Prosecutor or the Principal State Prosecutor, DNA profiles based on biological testing of persons convicted with final effect of one of the offences listed in Article 706-55 shall be registered in the database.”

Article R. 53-14

“Registered information may be retained for a maximum of forty years from:

... the date on which the conviction became final ... in the case of the profiles mentioned in paragraph II of Article R. 53-10.

...”

15. In reply to a parliamentary question, the Minister of Justice stated that a draft Decree proposed amending Article R. 53-14 CPP to vary the length of data storage according to the nature of the offence committed and whether or not the perpetrator was under age (Question no. 86834, Assemblée Nationale, Official Gazette of 19 April 2016, p. 3447).

B. Constitutional Council Decision No. 2010-25 QPC

16. On 16 September 2010 the Constitutional Council, to which the Court of Cassation had submitted a priority request for a preliminary ruling

on constitutionality on 17 June 2010, gave a decision declaring Articles 706-54 to 706-56 CPP, as worded prior to Law No. 2010-242 of 10 March 2010, in conformity with the Constitution, subject to paragraphs 18 and 19 of the decision, which read as follows:

“18. Considering ... that the registration in the DNA database on persons convicted of specific offences and persons in respect of whom there is strong or corroborated evidence that they have committed one of those offences is necessary for identifying and apprehending the perpetrators of such crimes or offences; that the last indent of Article 706-54 states that the duration of storage of the information registered should be specified in a separate decree; that, accordingly, it is incumbent on the regulating authority to ensure that the duration of storage of such personal data, in view of the purpose of the database, is proportional to the nature and/or the seriousness of the offences in question ...”.

...

C. Relevant case-law of the Court of Cassation

17. In a judgment of 11 July 2012 (Cass. crim., no. 12-81.533) declining to refer to the Constitutional Council the priority request for a preliminary ruling on constitutionality formulated by the appellant, the Court of Cassation held that the provisions of Articles 706-54 to 706-56 CPP, as worded prior to Law No. 2010-242 of 10 March 2010, had been declared compatible with the Constitution by Constitutional Council decision of 16 September 2010. In its judgment delivered in the same case on 19 March 2013, the Court of Cassation dismissed the appeal on points of law as follows:

“... given that DNA profiling amounts to an interference with the exercise of the right to respect for private life, it is a measure which is not manifestly disproportionate, which is necessary in a democratic society for the prevention of public disorder and criminal offences and which is applicable, without discrimination, to all persons convicted of the offences listed in Article 706-55 of the Code of Criminal Procedure”

D. Relevant international materials

18. See *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 41-55, 4 December 2008.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

19. The applicant alleged that there had been a breach of his right to respect for his private life on account of the order to provide a biological sample for inclusion in the FNAEG and the fact that his refusal to comply with that order has resulted in a criminal conviction. He relied on Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

20. The Government contested that argument.

...

B. Merits

a) The applicant

22. The applicant first of all noted that, whereas the original purpose of the FNAEG had been to store DNA profiles of sex offenders, it now covered a wide range of offences, whatever their degree of seriousness and the extent of the public disorder which they entailed. The impugned information storage could not be considered legitimate in the case of all the offences listed in Article 706-55 CPP, ranging from crimes against humanity to acts committed in the framework of trade union violence. The generalised, undifferentiated nature of the data recording method rendered it contrary to the principles of Article 8 of the Convention, as it was neither justified by the aim pursued nor necessary, given the absence of discretionary powers and of any possibility of adjustment depending on the actual offence committed.

23. The applicant also submitted that the Government had failed to explain why the storage of his personal data was necessary for forty years or why he might be liable to reoffend. In view of the nature and degree of seriousness of the offence of which he had been convicted, it was disproportionate to store his DNA profile for forty years.

24. As regards the data storage period, the applicant also considered that although a timeline of forty years was in conformity with the French Constitution, the Constitutional Council had issued no reservations as to

interpretation, and the Government were not planning to amend the time-limit by decree. Nevertheless, he noted that the Government had so far taken no action in that regard. He also observed that the duration of storage of fingerprints in some of the most serious cases (see *Gardel v. France*, no. 16428/05, § 67, ECHR 2009) was shorter than that stipulated for the FNAEG.

25. Furthermore, the applicant emphasised that the databank was supervised by a prosecutor, who is not a judicial authority for the purposes of the Convention (see *Moulin v. France*, no. 37104/06, § 57, 23 November 2010). This meant that a request for deletion of the data had to be submitted to a member of the legal service devoid of any guarantee on independence. Moreover, the FNAEG was used for policing purposes and could be consulted by a wide range of international law enforcement agencies, without any real safeguards for the data subjects.

b) The Government

26. The Government, who did not deny the existence of an interference with the applicant's right to respect for his private life, first of all noted that that interference had been legally based on Article 706-56 CPP, with the legal regulations governing the FNAEG being set forth in Articles 706-54 *et seq* and R. 53-9 *et seq* CPP.

27. They pointed out that the purpose of the FNAEG was to facilitate the investigation and identification of offenders by means of DNA profiling. In 2001, the importance attached by the legislature to the development and the effectiveness of that database had led it to criminalise any refusal to undergo the requisite biological testing. The whole FNAEG system had been validated by the Constitutional Council (see paragraph 16 above). Furthermore, the FNAEG was, in the Government's view, akin to the national sex offenders database (FIJAIS), which the Court had found compatible with the requirements of Article 8 of the Convention (see *B.B. v. France*, no. 5335/06, 17 December 2009; *M.B. v. France*, no. 22115/06, 17 December 2009; and *Gardel*, cited above). The impugned interference thus pursued the legitimate aim of "the prevention of disorder or crime".

28. The Government emphasised that unlike the regulations at issue in the case of *S. and Marper* (cited above, § 119), only the offences exhaustively listed in Article 706-55 CPP gave rise to registration in the FNAEG. Although the database had originally been intended to include DNA profiles solely in the framework of sex offences, its scope had been extended under several successive reforms. The offences covered were all serious to some extent, and all but one were subject to a prison sentence. Apart from cases of crimes and offences punishable with ten years' imprisonment, the biological testing could be conducted without the person's consent, and it was impossible use the DNA profiles stored in order to analyse genetic characteristics.

29. The Government further noted that the State Prosecutor was not empowered to assess the expediency of registering a person convicted of one of the offences in question in the FNAEG. Indeed, the use of the code set out in Article R. 53-21 CPP afforded no margin of appreciation to prosecutors.

30. The Government took the view that the conditions for the use, consultation and storage of data in the FNAEG were underpinned by proper procedural safeguards. The database was operated by the Ministry of the Interior's Central Directorate of Police, under the dual supervision of a senior-ranking prosecutor appointed by decree of the Minister of Justice, and of the National Commission on Data Processing and Civil Liberties. The relevant information could only be accessed, and data comparisons carried out, by staff of the police forensic and technical services and duly authorised gendarmerie staff.

31. The Government also denied that the lack of a data deletion procedure for convicted persons was abusive, since the maximum data storage period was forty years, DNA profile registration in the FNAEG did not impose any positive obligation on the person concerned and the data were only used in the event of recidivism.

32. Nevertheless, in view of the reservations entered by the Constitutional Council, including one concerning the proportionality of the time for which DNA profiles were kept, and in order to comply with those reservations, the Government stated that they would shortly be tabling before the *Conseil d'État* a draft decree amending accordingly the provisions of Article R. 53-14 CPP.

2. The Court's assessment

33. The Court reiterates that the mere fact of storing data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (see *Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II). As regards DNA profiles, they do contain substantial amounts of unique personal data (see *S. and Marper*, cited above, §75).

34. Furthermore, the Court observes at the outset that it fully realises that in order to protect their population as required, the national authorities can legitimately set up databases as an effective means of helping to punish and prevent certain offences, including the most serious types of crime, such as the sex offences for which the FNAEG was originally created (cf., in particular, *Gardel, B.B. and M.B.*, cited above, §§ 63, 62 and 54 respectively). However, such facilities cannot be implemented as part of an abusive drive to maximise the information stored in them and the length of time for which they are kept. Indeed, without respect for the requisite

proportionality *vis-à-vis* the legitimate aims assigned to such mechanisms, their advantages would be outweighed by the serious breaches which they would cause to the rights and freedoms which States must guarantee under the Convention to persons under their jurisdiction (see *M.K. v. France*, no. 19522/09, § 35, 18 April 2013).

35. In the instant case, the Court notes that the applicant has not so far been included in the FNAEG because he refused to undergo DNA profiling as required by law. He was nonetheless convicted on that basis. It is not contested that that conviction amounted to an interference with the applicant's right to respect for private life within the meaning of Article 8 § 1 of the Convention.

36. The Court also observes that the parties did not dispute that the interference in question had been in accordance with the law, that is to say Articles 706-54 to 706-56 and R. 53-9 et seq. CPP, and had pursued the legitimate aim of detecting, and therefore preventing, disorder and crime (*ibid.*). The Court further notes that the interference pursued a legitimate aim, namely detecting and therefore preventing crime.

37. The Court must therefore examine whether the interference was necessary *vis-à-vis* the requirements of the Convention. Since the national authorities make the initial assessment as to where the fair balance lies in a case before a final evaluation by this Court, a certain margin of appreciation is, in principle, accorded by this Court to those authorities as regards that assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the activities restricted and the aims pursued by the restrictions. Where a particularly important aspect of someone's life or identity is in issue, the State's margin of appreciation is generally narrower.

38. Personal data protection plays a primordial role in the exercise of a person's right to respect for his private life enshrined in Article 8 of the Convention. Domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of that Article. The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should, in particular, ensure that such data are relevant and not excessive in relation to the purposes for which they are stored, and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. The domestic law should also comprise safeguards capable of effectively protecting the personal data recorded against inappropriate and wrongful use (see *B.B.*, cited above, § 61), while providing a practical means of lodging a request for the deletion of the data stored (see *B.B.*, cited above, § 68, and *Brunet*, cited above, §§ 41-43).

39. In the present case, the registration in the database, which the applicant avoided at the cost of a criminal conviction, does not in itself impose any obligation on the person concerned. Furthermore, it is subject to a sufficiently strict consultation procedure.

40. The Court also notes that Article 706-56 CPP stipulates that such registration cannot be effected on the basis of biological material that has become detached from the person's body by natural means (see paragraph 14 above).

41. Moreover, it notes that under Article 706-54 CPP only the offences exhaustively listed in Article 706-55 CPP can give rise to registration in the FNAEG.

42. In that regard, however, it should be noted that pursuant to Article R. 53-14 of the Code of Criminal Procedure, the duration of storage of DNA could not exceed forty years in the case of persons convicted of offences which the Government considered to display "a specific degree of seriousness". The Court notes that that forty-year period in principle constitutes a maximum which should have been adjusted under a separate decree. Since no such decree has ever been issued, the forty-year period is, in practice, treated as indefinite storage, or at least as a norm rather than a maximum (see *M.K.*, cited above, § 45, and *Brunet*, cited above, § 43), particularly in the case of persons of mature age.

43. The Court further observes that on 16 September 2010 the Constitutional Council issued a decision to the effect that the provisions relating to the impugned computer file were in conformity with the Constitution, subject *inter alia* to "determining the duration of storage of such personal data depending on the purpose of the file stored and the nature and/or seriousness of the offences in question" (see paragraph 15 above). To date, no appropriate action has been taken on that reservation (see paragraphs 14 and 42 above). Thus, the Court notes that no differentiation is currently provided for according to the nature and/or seriousness of the offence committed, notwithstanding the significant disparity in the situations potentially arising under Article 706-55 CPP. The applicant's situation bears witness to this, with events occurring in a political/trade-union context, concerning mere blows with an umbrella directed at gendarmes who have not even been identified (see paragraphs 7 and 8 above), contrasting with the seriousness of the acts liable to constitute the very serious offences set out in Article 706-55 CPP, such as sex offences, terrorism, crimes against humanity and trafficking in human beings, to mention but a few. To that extent the instant case is very different from those specifically relating to such serious offences as organised crime (see *S. and Marper*, cited above) or sexual assault (see *Gardel, B.B.* and *M.B.*, cited above).

44. Furthermore, as regards the deletion procedure, it is not disputed that access to such a procedure is only authorised for suspects, and not for

convicted persons such as the applicant. The Court considers that convicted persons should also be given a practical means of lodging a request for the deletion of registered data (*B.B.*, cited above, § 68, and *Brunet*, cited above, §§ 41-43). That remedy should be made available, as it has previously pointed out, in order to ensure that the data storage period is proportionate to the nature of the offences and the aims of the restrictions (see paragraph 37 above; cf., *mutatis mutandis*, *Peruzzo and Martens v. Germany* (dec.), nos. 7841/08 and 57900/12, § 44, 4 June 2013, as well as *B.B.* and *M.B.*, cited above, §§ 62 and 54 respectively).

45. Therefore, the Court considers that, owing to its duration and the lack of a possibility of deletion, the current regulations on the storage of DNA profiles in the FNAEG, to which the applicant objected by refusing to undergo sampling, does not provide the data subject with sufficient protection. It therefore does not strike a fair balance between the competing public and private interests.

46. These facts are sufficient for the Court to find that the respondent State overstepped its margin of appreciation in this sphere. Therefore, the applicant's conviction for having refused to undergo DNA profiling for inclusion in the FNAEG amounted to a disproportionate infringement of his right to respect for private life, and therefore cannot be deemed necessary in a democratic society.

47. There has accordingly been a violation of Article 8 of the Convention.

...

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

...

2. *Holds* that there has been a violation of Article 8 of the Convention;

...

Done in French, and notified in writing on 22 June 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President